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**OPINION ON THE ALBANIAN DRAFT BILL
ON THE REGULATION OF THE PARLIAMENTARY
INVESTIGATION COMMISSIONS**

Prepared by

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On the Albanian draft - bill on the regulation of the parliamentary investigation commissions.

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1. According to art. 77 of the Albanian Constitution " the Assembly has the right and, upon the request of one - fourth of its members is obliged, to designate investigatory commissions to review a particular issue. Its conclusions are not binding on the courts, but they may be made known to the office of the prosecutor, which evaluates them according to legal procedures. Investigatory committees operate according to the procedures set by law ".

The draft is therefore the result of the choice made by the constitutional legislator to entrust the law with the task of regulating the functioning of the parliamentary investigation commissions. Other constitutions prefer giving that task to the parliamentary standing orders in the frame of detailed constitutional provisions. Such a solution is aimed at strenghtening the autonomy of the Assemblies in presence of a bicameral Parliament when both the Chambers have to concur in the adoption of the laws but each of them is allowed to approve separately its own standing orders. This is not the case of Albania which has a monocameral Parliament: the same body approves the standing orders of the Assembly and the laws. But choosing the instrument of the law the Constitution requires that the parliamentary decision on the regulation of the functioning of the investigation commissions has to be promulgated - on the basis of art. 84 of the Constitution - by the President of the Republic, who is allowed by the following art. 85 " to return a law for review only once ". Moreover laws may be submitted to the Constitutional Court, while there isn't an explicit provision concerning the

parliamentary standing orders. On the other side, a law is adopted by the Assembly " with a majority of votes, in the presence of more than half of its members ", while the parliamentary internal regulations have to be approved by the majority of all the members of the Assembly (artt. 78.1 and 75.2 of the Constitution). Pros and cons of the two solutions have to be balanced but at the moment the constitutional choice is binding.

While the Assembly has to comply with the choice made by art. 77 of the Constitution, the other bodies of the State should refrain from interfering in the investigatory activities of the Assembly. The President of the Republic should avoid returning the law for review on the basis of political reasons instead of constitutional complaints, that is complaints concerning the compliance with the Constitution.

2. A point deserves special attention by the observer: *the distribution of the matter between the law envisaged by the present draft and the parliamentary decision of establishing a parliamentary investigation commission.* The draft does not require a law for the establishment of a parliamentary investigation commission, notwithstanding that the decision of the Parliament has to provide not only for " the composition and the schedule " of the commission, but also for its " duties " (art. 4 par. 2 and 3). Apparently the mention of the duties of the commission could imply a reference to the powers and the procedures of that body. But I guess that the words used in the last part of art. 4 of the draft should be interpreted taking in account the fact that the powers of the commission shall be defined and regulated by the law, and not by a non - legislative decision of the Assembly. Therefore we have to look for the meaning of the

word " duties " in the context of the draft: it certainly implies a reference to " the object for examination " assigned to a commission and " the motivation for the conduct of this investigation ". The competences of the commission which affect not only the internal functioning of that parliamentary body but also its relations with third persons, are regulated directly by the law (look at art. 13 of the draft), and the parliamentary decision establishing the commission is not allowed to amend the rules of the law and has to deal only with matters concerning the individual tasks of the commissions which are being established. It may be both an investigative task requiring the exercise of the competences of " the authority of the penal proceedings " (with its restrictions) provided for by the mentioned art. 13, or a cognitive task which does not require the exercise of those competences (art. 14 of the draft). Perhaps the terminology of the draft should be amended in such a way of avoiding a different interpretation of the word " duties "; for instance, it could be advisable adopting in the last part of the mentioned art. 4 a reference to the other provisions of the same article.

Strictly connected with the previous point is that of the matter of *the organization and the schedule of functioning of the commission*. The draft emphasizes the role of the Assembly in the field:

- the chairmanship of the commission has to be elected by the Parliament (art. 6),
- the Parliament has to provide for the schedule of the activity of the commission (art. 4),
- apparently all the members of the Parliament are allowed to interfere with the functioning of the commission requiring " nominal voting or secret ballot " for the adoption of the decisions of the commission (art. 9).

I would suggest that the dependence of the commission of the commission on the plenary body of the Assembly should be restricted:

- to avoid a " politicization " of the election of the chairmanship, this body, that is the chairman, the deputy chairman and the secretary of the commission, should be appointed by the Speaker of the Assembly,
- the power of the Parliament of providing for the schedule of the commission should be limited to the setting of the deadline for the submission of the final report of the commission which has to be free in establishing the program of its activities,
- only the members of the commission should be allowed to require " nominal voting or secret ballot ", when the commission is taking a decision.

Art. 5 provides for the decision concerning *the composition of the commission* setting up a procedure by consensus: the provision is not very clear probably because of the translation. In any case a vote of the plenary body of the Assembly should be avoided and the rules concerning the choice of the members of the commission may be amended in such a way of ensuring a fair balance between the principle of the proportional representation of the political groups present inside the Assembly and the rule which ensures the participation of at least one representative for each group in the commission. For instance, in case of conflict between the proportionality principle and the rule of minimal representation the second should prevail on the first. The choice of the individual members could be left both to the groups concerned or to the Speaker (for instance, on the basis of nominations submitted by the groups). The choice between these two different alternatives has to take in account the preference of the legislator for a more politicized membership or for a more neutral and independent (and therefore

attentive to the technical exigencies of the work which has to be made) composition of the commission.

3. With regard to *the rules of procedure for the conduct of the investigation and the data collection* the draft - bill correctly distinguishes investigative tasks and cognitive tasks. In view of *the implementation of the investigative tasks* a commission has to provide for " the collection of evidence and the investigation of the case ": it " enjoys the same competences and is subject to the same restrictions as those which are valid for the authority of the penal proceedings, on the basis of the provisions of the Code of Penal Procedure " (art. 13). On the basis of this rule and in view of guaranteeing its independence the commission should be allowed to issue directly an order to summon the witnesses without needing an act of other authorities. *The cooperation of the " judicial police of the judicial department in the prosecutor's office "* (art. 15) should be restricted to accompanying the persons concerned to the seat of the commission when they don't comply with the order and on the basis of the order itself.

Because the scope of the powers of the commission is limited to the collection of evidence and the investigation of the case, it is evident that a commission is not taking the place of the judicial authorities in deciding criminal cases. Therefore *the conclusions of a commission " are not binding on the courts "* (art. 77 of the Constitution), and also for the prosecutor's office, " which examines them in the light of the legal procedure to find out whether any violation of the laws has taken place " (art. 2). In view of insuring an efficient implementation of these provisions the law should entrust to the Speaker of the Assembly the duty of sending a copy of the final report of a commission to the judicial authorities and the prosecutor's office. The

same rule should be applied in the case dealt with in art. 15 par. 3: " if in the course of the witnesses' cross - examination the commission finds out that it has to do with a penal act, which does not constitute the object of the investigation ", the prosecutor's office has to be informed and will decide to start a penal proceeding or not. The duty of the parliamentary bodies has to be restricted to the sending of the information, they cannot be allowed to ask " the prosecutor's office to start penal proceedings " because according to art. 148.3 of the Albanian Constitution " in the exercise of their powers, the prosecutors are subject to the Constitution and the laws ", and are - therefore - independent of other bodies of the State. The final part of art. 15 par. 3 should be amended.

While in the implementation of the investigative tasks a commission shall comply with the formalities of the criminal procedure rules, a *cognitive commission* is free in the execution of its tasks organizing hearings, requiring informations and providing for the exhibition of documents. The request of acts and documents may cause a conflict with the judicial authorities when these authorities refuse the exhibition of papers " for reasons of secrecy ". According to art. 16 par. 2 the commission would be allowed to bypass the conflict declaring the refusal unjustified and insisting for the exhibition of the acts and document which the judicial authorities could not refuse. This solution is not satisfying from the point of view of the independence of the judiciary. The Italian constitutional experience would suggest entrusting the solution of the case to the Constitutional Court in the light of art. 131 d of the Albanian Constitution (" The Constitutional Court decides on.....conflicts of competences between powers ").

Art. 18 should be coordinated with art. 73 of the Albanian Constitution concerning the privileges of the members of the Assembly.

4. A last remark regards art. 19. It states that " the report contains the conclusions, the measures for the persons responsible, and the eventual proposals for legislative amendments ". It is evident that as far as not only legislative amendments but also measures for the persons responsible are at stake, the commission is only allowed to submit proposals to other State's bodies without interfering in the exercise of the functions of these bodies. Perhaps the text should be amended in conformity with the interpretation we are proposing: it should be evident that the commission does not have the competence of adopting the measures or the legislative initiative of the amendments. On the other side, art. 20 of the draft supports our construction because provides - on one side - for the transmission of the report by the Parliament " to the relevant bodies " and, on the other side, calls the Parliament to take the decisions concerning " the other parliamentary and legislative measures that need to be undertaken ".

University of Trieste, March 21st 2001


(prof Sergio Bartole)

Addendum

Some other remarks are required by the constitutional provision allowing one fourth of the members of the Assembly to require the appointment of a parliamentary investigative commission. The request obliges the Assembly to adopt the necessary deliberation.

The choice of the Albanian Constitution does not imply that the parliamentary minority has to have the prevalence in the composition: even in this case the last alinea of art. 5 of the bill shall be applied. But " the object for examination " assigned to the commission should be determined according to the proposal submitted by the parliamentarians of the opposition: the bill does not clarify this point while the point deserves to be developed. The Assembly may make a choice coherent with the preference accorded by the Constitution to the proposal of the parliamentary minority; or it could decide to leave the final decision on this point to the majority, but in this case the provision allowing a special request of one fourth of all the members of the Parliament would not make any sense at all because the more favourable first alinea of art. 4 of the bill allows five members of the Parliament to require the establishment of an investigation commission. The same conclusion should be reached with regard to the choices concernig the evidence which the commission has to look for.

A minority final report - when the opposition does not agree with the conclusions of the majority - should be allowed even when the establishment of the investigative commission was decided by the majority without a special request of the minority.